

The Appeals Board adopts the stipulations listed in the April 5, 1994 Award.

ISSUES

The Administrative Law Judge entered an Award for benefits based upon twenty-one percent (21%) permanent partial general disability and used August 1, 1989 as the date of accident. Claimant identified the following issues to be reviewed on appeal:

- (1) What date or dates of accident should be used?
- (2) What was claimant's average weekly wage?
- (3) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

- (1) The Appeals Board adopts the stipulated dates of accident but finds that claimant's accident was a repetitive series of accidents. The Appeals Board will, therefore, use the last stipulated date of accident as the date from which benefits will be calculated. The Appeals Board construes the stipulation as a stipulation to a series of accidents or period of accidents up to and including November 30, 1991.

Claimant testified that in late 1988 he began experiencing pain in his right hand as a result of repetitive work activities. Claimant went to his family physician who diagnosed carpal tunnel syndrome. Claimant reported the problem to respondent in February 1989, and was referred to Dr. Watts for treatment. Dr. Watts recommended claimant wear splints at work and claimant continued to work through some time in August of 1989. In August of 1989 claimant began having numbness in his right hand and also developed right shoulder pain. Dr. Watts recommended surgery and in September of 1989 claimant underwent carpal tunnel release on the right. Dr. Watts released claimant to return to work with restrictions in January 1990. Claimant was not able to return, apparently in part because respondent did not find a position for claimant, until August 1991.

In August 1991, claimant returned to work for respondent at a job cleaning parts and preparing parts for cleaning. The job required repetitive gripping to clip or tie the parts to a line. The job also required claimant to lift parts weighing from a few ounces to fifty (50) pounds. The job duties violated recommended restrictions and claimant began experiencing increased symptoms in his right hand and shoulder. After approximately two weeks on this job, claimant reported the problem to respondent and respondent switched claimant to the steel clean line, a job involving less gripping. Claimant testified that he developed right elbow pain in October 1991. Respondent referred claimant to Dr. Lesko for treatment and Dr. Lesko recommended surgery which had a fifty-fifty (50-50) chance of improving claimant's shoulder problems. Claimant declined the surgery and Dr. Lesko continued to treat claimant until March or April of 1992. In March of 1992, respondent closed the steel clean line and moved claimant to a job stamping a number on parts.

Claimant later changed to a de-greasing job which involved loading parts into a basket, picking up the basket with a crane and dipping the basket into a tank to bake or de-grease. At the time of the regular hearing in December 1991, claimant was doing the de-greasing job. He testified the job duties violated recommended work restrictions and he continued to have problems.

From this evidence the Appeals Board is asked to determine what date or dates of accident should be used. At the time of the regular hearing claimant's counsel answered the Court's question about date of accident as follows:

"This is where it gets complicated. He had carpal tunnel problems that began in November of 1988, and it's right carpal tunnel, and a right shoulder problem that began in August of 1989. He was off from 1990, at some point in time, clear until August of 1991, and then he started back to work August the 15th of 1991 and has had additional injuries involving the shoulder, the right shoulder, and involving a -- a new problem involving the right elbow, and those began probably with repetitive injuries beginning in August of 1991, specific incidents in probably October or November of 1991."

When asked whether respondent admitted claimant met with injury on the dates alleged, respondent's counsel answered:

"Well, we won't deny that the claimant has alleged these injuries and are not denying that he's sustained compensable injuries."

When next asked whether the injuries arose out of employment, respondent indicated, "That will also not be denied." The Court then asked if that meant respondent was admitting "the first one," respondent said, "Yes, we'll admit it." The Appeals Board understands this exchange to mean respondent was admitting claimant experienced injury on the dates alleged. In their submission letter, claimant and respondent both later listed dates of accident as issues to which they had stipulated.

From the evidence and stipulations, one might find that claimant suffered three separate accidents: injury to the right forearm, i.e. carpal tunnel in 1988, injury to his shoulder in 1989, and injury to the right elbow in 1991. However, the evidence indicates claimant's injuries, including the carpal tunnel, shoulder and elbow injuries, continued to be aggravated up through at least the latest stipulated date of accident. The latest stipulated date of accident was "October or November" of 1991. Claimant testified his shoulder and hand complaints worsened after he returned to work in August 1991. The elbow problems first appeared in October 1991. Dr. Schlachter, the evaluating physician, testified that after claimant returned to his job in August 1991, the work aggravated claimant's wrist, shoulder and elbow problems.

In addition, the evidence presented does not permit separation of the disability. The only rating of claimant's functional impairment found in the record is the rating of Dr. Schlachter. Dr. Schlachter separates the ratings on the shoulder and the arm but did not separate the elbow and carpal tunnel problems. The Appeals Board therefore finds the injuries should be treated in this case as one injury resulting from cumulative trauma over a period of time extending at least as late as the last stipulated date. The record suggests claimant's injuries may have become worse even after the latest stipulated date. He continued to perform repetitive duties and continued to receive treatment. However, the

evidence does not establish with any certainty that permanent disability increased beyond the stipulated dates. The record, in fact, only indicates that the work activities after return to work in August 1991, aggravated claimant's injuries. The Appeals Board is, therefore, willing to find the permanency increased through the last stipulated date of accident. The last stipulated date was not, however, one date but two months, "October or November 1991." Because the evidence suggests continuing aggravation, the Appeals Board will use November 30, 1991 as the last stipulated date and as the date of accident for computation of benefits.

By using the stipulated date of accident in this case, the Appeals Board does not intend to suggest stipulated dates should always be used. If the evidence established a different date, the evidence may override the stipulation. The Appeals Board makes this decision fully aware of the recent decision of the Court of Appeals in Berry v. Boeing Military Airplanes, No. 71,001 (Dec. 1994). In Berry the Court of Appeals held that the last day worked should be considered the date of accident in all carpal tunnel cases. The last day worked cannot be considered the date of accident in this case for an obvious reason, claimant continues to work. In this case, as the evidence does not clearly suggest a more definite date the stipulation will be relied upon.

(2) The Appeals Board finds that claimant's average weekly wage was \$647.78.

The evidence relating to wages does not line up with the dates of accident. The parties stipulated to average weekly wage in February 1989, August 1989, and August 1991. Respondent also submitted a wage record showing the wage at the time of the regular hearing in December 1992. The record does not show a precise average weekly wage in October or November of 1991. At the regular hearing respondent stipulated that the wage as of the last alleged date of accident, then considered August 1991 as the beginning of a series of accidents, was \$647.78. The record also reflects that by the time of regular hearing, claimant's wage had increased. The Appeals Board concludes that as of November 30, 1991, claimant's average weekly wage was probably not less than the \$647.78 agreed upon as the wage in August 1991. Claimant has the burden of proving the wage. The alternative appears to be for the Appeals Board to conclude claimant has not proven the wage on the date of accident and therefore has not proven an element of the claim necessary to recovery. This result would be too harsh. The Appeals Board, therefore, accepts the wage of \$647.78 shown shortly before the date of accident in this case where the evidence suggests an increasing wage.

(3) The Appeals Board finds claimant has twenty-one percent (21%) permanent partial general disability.

The only functional impairment rating introduced was that given by Dr. Schlachter. Dr. Schlachter examined claimant on July 28, 1993. He diagnosed overuse syndrome and tendinitis of the right shoulder, epicondylitis of the right elbow and aggravation of pre-existing carpal tunnel syndrome. Dr. Schlachter concluded claimant has twenty percent (20%) impairment of function to the right upper extremity which he converts to a twelve percent (12%) impairment of the body as a whole and a ten percent (10%) impairment to the body as a whole from the shoulder injury. He combines these two ratings to a twenty-one percent (21%) permanent partial impairment of function to the body as a whole.

Permanent partial disability is awarded upon the basis of work disability or functional impairment, whichever is higher. K.S.A. 1990 Supp. 44-510e. When the claimant returns

to work at a comparable wage, there is a presumption claimant has no work disability. K.S.A. 1990 Supp. 44-510e(a); Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979). In this case, claimant returned to work for respondent. At the time of the regular hearing he had been working for approximately a year and one-half and was earning a higher wage. The presumption can be overcome in some cases. Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). The Appeals Board finds the evidence does not overcome the presumption. The award should, therefore, be limited to functional impairment which the Appeals Board finds to be twenty-one percent (21%). Accordingly the Appeals Board awards benefits based upon a twenty-one percent (21%) permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated April 5, 1994, is modified as follows.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tony L. Cash, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred November 30, 1991 and based upon an average weekly wage of \$647.78, for 103 weeks of temporary total disability compensation at the rate of \$271.00 or \$27,913.00, followed by 312 weeks at the rate of \$90.69 or \$28,295.28 for a 21% permanent partial general body impairment of function, making a total award of \$56,208.28.

As of January 2, 1995, there is due and owing claimant 103 weeks of temporary total disability compensation at the rate of \$271.00 or \$27,913.00, followed by 58.43 weeks of permanent partial disability compensation at the rate of \$90.69 per week in the sum of \$5,299.02, for a total of \$33,212.02 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$22,996.26 is to be paid for 253.57 weeks at the rate of \$90.69 per week, until fully paid or further order of the director.

Claimant is entitled to a payment of unauthorized medical expenses to the statutory limit. Future medical will be considered upon proper application to the Director.

Pursuant to stipulation, respondent is liable for twenty percent (20%) and the Workers Compensation Fund for eighty percent (80%) for all temporary total disability, permanent partial disability, medical benefits, vocational rehabilitation expenses, litigation costs, and all other amounts awarded to claimant. Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Respondent 20% and Workers Compensation Fund 80% to be directly paid as follows:

Ireland Court Reporting	
Deposition of Tony Cash	\$180.47
Deposition of Monty D. Longacre	\$448.50

Deposition of Ernest R. Schlachter, M.D.	\$280.95
Deposition Services	
Transcript of Regular Hearing	\$224.80

IT IS SO ORDERED.

Dated this ____ day of January, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Vincent L. Bogart, Attorney at Law, Wichita, KS
Frederick Haag, Attorney at Law, Wichita, KS
Scott J. Mann, Attorney at Law, Hutchinson, KS
John D. Clark, Administrative Law Judge
George Gomez, Director